STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 22, 2008
v	No. 271870 Genesee Circuit Court
BARBARA SUE WILLIAMS, Defendant-Appellant.	LC No. 04-013953-FH

Before: Zahra, P.J., and White and O'Connell, JJ.

PER CURIAM.

Defendant pleaded guilty of four counts of embezzlement, MCL 750.174a(4)(a) and (5)(a), and one count of common-law obstruction of justice, MCL 750.505, for which she was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 76 to 240 months for the embezzlement convictions and 76 to 180 months for the obstruction of justice conviction. The trial court denied defendant's postjudgment motion to withdraw her guilty pleas. After this Court originally denied defendant's delayed application for leave to appeal, our Supreme Court remanded this case to this Court for consideration as on leave granted. *People v Williams*, 475 Mich 910; 717 NW2d 338 (2006). We affirm defendant's convictions of embezzlement, reverse defendant's conviction of common-law obstruction of justice, and remand for further proceedings consistent with this opinion.

I Basic Facts and Procedure

This case arises from defendant's manipulation of her relationship with Juanita Kemp, a vulnerable adult, and her attempt to persuade Kemp to urge the prosecution to dismiss the embezzlement charges brought against defendant. Defendant pleaded guilty as charged. She also admitted to her habitual offender status. The sentencing guidelines for the embezzlement conviction, a Class D offense, placed the minimum sentence range at 19 to 76 months as an habitual offender. MCL 777.16i; MCL 777.21(3)(c); MCL 777.65.

Defendant raises three issues on appeal. First, defendant contends that the trial court erred in denying her post-judgment motion to withdraw her pleas due to insufficient factual bases for the pleas. Second, defendant maintains the prosecution violated her right to be free from double jeopardy when the prosecution aggregated some but not all of the alleged wrongful conduct to transform one wrongful act into multiple felonies. Third, defendant challenges her sentencing guidelines scoring. Each issue is addressed separately.

II Withdrawal of the Pleas

A. Standard of Review

A post-judgment motion to withdraw a plea is reviewed for an abuse of discretion resulting in a miscarriage of justice. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999), aff'd 463 Mich 446 (2000). "In reviewing the adequacy of the factual basis for a plea, this Court examines whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996).

> A factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted. This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference. Even if the defendant denies an element of the crime, the court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says. [*People v Jones*, 190 Mich App 509, 511-512; 476 NW2d 646 (1991) (Citations omitted).]

B. The Embezzelment Counts

The crime of embezzlement "is designed to protect against situations in which the agent gains access to the principal's money through a position of trust and either simply steals it from him or attains control of the money through deception." *People v Lueth*, 253 Mich App 670, 690-691; 660 NW2d 322 (2002). At the time the offenses were committed, the crime as charged required proof that defendant obtained money from a vulnerable adult by violating "a relationship of trust" with that person. MCL 750.174a(1). A person is in a relationship of trust if she "is a caregiver, relative, . . . household member, court-appointed fiduciary, or other person who is entrusted with or has assumed responsibility for the management of the vulnerable adult's money or property." MCL 750.174a(11)(c). The statute defines a "[v]ulnerable adult" to mean "an individual . . . who, because of age, developmental disability, mental illness, or disability, whether or not determined by a court to be an incapacitated individual in need of protection, lacks the cognitive skills required to manage his or her property." MCL 750.174a(11)(d).

The record reveals that defendant repeatedly admitted that she stood in a relationship of trust with Kemp, a vulnerable adult. However, defendant stated that she was not Kemp's caretaker or employee and defendant denied that she helped manage Kemp's money or property. Because there is nothing to suggest that defendant was related to or residing with Kemp or was appointed by the court to serve in a fiduciary capacity, her culpability under the statute, if any, turns on whether she was a "caregiver" as that term is used in the statute. The statute does not define the term "caregiver."

When a term is not expressly defined by statute, courts must first review the term in its proper context, giving every word or phrase of the statute its plain and ordinary meaning. MCL 8.3a; *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). If the legislative intent cannot be determined from the statute itself, a court may consult dictionary definitions. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006).

We need not consult a dictionary to determine the meaning of the term "caregiver" as it is used in MCL 750.174a(11)(c). As used in the statute, it is self evident that a caregiver is any person who in any way assists in the care of a vulnerable adult. Nothing in the statute supports the conclusion that a minimum amount of care be provided before one may be deemed a "caregiver" and thus "a person in a relationship of trust" under this statute. The Legislature did not limit its definition to situations where the caregiver receives compensation for services or rendered services on a regular basis.

The record at the plea proceeding indicated that defendant befriended Kemp after answering a help-wanted advertisement. Initially, Kemp intended to hire defendant to perform lawn-care services. However, after Kemp bonded with defendant, Kemp relied on defendant to hire a lawn-care service on Kemp's behalf. Additionally, defendant assisted in Kemp's care by acting as Kemp's chauffeur. Thus, Kemp, who was either unable or unwilling to drive an automobile, was permitted to address her needs only because of defendant's assistance. Accordingly, we conclude that defendant provided a sufficient factual basis to establish she was a caregiver under the statute and thus, there was sufficient factual support for her guilty plea convictions of embezzlement under MCL 750.174a(1).

C. Common-law Obstruction of Justice

Defendant was also charged with the common-law offense of obstruction of justice. That offense "is generally understood as an interference with the orderly administration of justice." *People v Thomas,* 438 Mich 448, 455; 475 NW2d 288 (1991). It comprises a category of separate offenses and the defendant's conduct must have been recognized as one of the offenses falling within that category. *Id.* at 456-458. Those offenses include, but are not limited to, the 22 offenses described in 4 Blackstone, Commentaries on the Laws of England, ch 10, as offenses against public justice. *Id.*; *People v Vallance,* 216 Mich App 415, 418-419; 548 NW2d 718 (1996).

Although not an offense described by Blackstone, intimidation of a witness in judicial proceedings is recognized as an offense constituting obstruction of justice. *Vallance, supra* at 419. Defendant contends that the factual basis for this charge was insufficient because it did not establish that she threatened, intimidated, or physically interfered with Kemp. Assuming arguendo that the witness-tampering statute, MCL 750.122, codified the common-law offense, see *People v Milstead,* 250 Mich App 391, 406 n 9; 648 NW2d 648 (2002), that statute recognizes that witness intimidation includes willfully interfering or attempting to interfere with a witness's ability to attend, testify, or provide information in an official proceeding, MCL 750.122(6), and such interference does not require proof of threats, intimidation, or physical interference. *People v Greene,* 255 Mich App 426, 438 n 6; 661 NW2d 616 (2003). Nonetheless, we conclude that defendant failed to provide an adequate factual basis for the plea on the common law count of obstruction of justice.

The record indicates only that defendant wrote to Kemp "asking her not to proceed with these charges." This request does not fall within the offenses against public justice described by Blackstone, does not amount to intimidation as that term is commonly understood ("to force into or defer from some action by inducing fear," *Random House Webster's College Dictionary,* 2 ed (1998), is not the equivalent of interfering with Kemp's ability to attend court, cf. *Lichens v Superior Court,* 181 Cal App 2d 573, 576; 5 Cal Rptr 539 (1960), and does not suggest that

Kemp decline to testify or provide information regarding the embezzlement offenses to authorities. Accordingly, we conclude that defendant failed to provide a factual basis for a conviction of obstruction of justice. Therefore, the trial court erred in denying defendant's motion to withdraw her plea on this count.

III Double Jeopardy

The embezzlement statute proscribes increasingly harsher punishments depending on the amount of money taken from the vulnerable adult. If the value is between $200 and $999, the offense is a misdemeanor punishable by one year in jail. MCL 750.174a(3)(a). If the value is between $1,000 and $19,999, the offense is a felony punishable by five years in prison. MCL 750.174a(4)(a). If the value is $20,000 or more, the offense is a felony punishable by 10 years in prison. MCL 750.174a(5). The statute further provides:

> Except as otherwise provided in this subsection, the values of money or property used or obtained or attempted to be used or obtained in separate incidents pursuant to a scheme or course of conduct within any 12-month period may be aggregated to determine the total value of money or personal property used or obtained or attempted to be used or obtained. If the scheme or course of conduct is directed against only 1 person, no time limit applies to aggregation under this subsection. [MCL 750.174a(6).]

Defendant was charged with four counts of felony embezzlement for taking less than $20,000 from the victim during the 2000 calendar year and for taking $20,000 or more from the victim during the 2001 through 2003 calendar years. She contends that while the prosecutor is authorized to aggregate sums of money obtained in separate incidents to elevate multiple misdemeanors to a 5- or 10-year felony, the prosecutor cannot selectively aggregate some but not all of the incidents and thus transform a single course of conduct from one 10-year felony into multiple felonies.

A. Standard of Review

"A double jeopardy issue constitutes an issue of law that is reviewed de novo on appeal." *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996). Statutory interpretation is a question of law that is reviewed de novo on appeal. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

B. Analysis

"A person may not be twice placed in jeopardy for a single offense." *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). This protection is afforded under both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15. The constitutional prohibition against double jeopardy provides three separate protections: "(1) it protects against a second prosecution for the same offense after acquittal, (2) it protects against a second prosecution for the same offense after conviction, and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

The protection against multiple punishments for the same offense "is to protect the defendant from having more punishment imposed than the Legislature intended." *People v Ford,* 262 Mich App 443, 447-448; 687 NW2d 119 (2004). It is a restriction on a court's ability to impose punishment in excess of that intended by the Legislature." *People v Fox (After Remand),* 232 Mich App 541, 556; 591 NW2d 384 (1998).

This Court recently addressed the multiple punishment aspect of our prohibition against double jeopardy:

> In the recently issued opinion of [*People v Bobby Smith,* 478 Mich 292; 733 NW2d 351 (2007)], the Michigan Supreme Court . . . concluded "that the ratifiers intended that the term 'same offense' be given the same meaning in the context of the 'multiple punishments' strand of double jeopardy that it ha[d] been given with respect to the 'successive prosecutions' strand." The federal courts, in interpreting the "same offense" language in the context of multiple punishments, first look to determine whether the Legislature expressed a clear intent that multiple punishments be imposed. If the Legislature clearly intended to impose multiple punishments, the imposition of multiple punishments, regardless whether the offenses share the same elements, does not offend the constitutional protections against double jeopardy. If the Legislature has not clearly expressed its intention to impose multiple punishments, federal courts apply the "same elements" test announced in *Blockburger v United States,* 284 US 299; 52 S Ct 180; 76 L Ed 2d 306 (1932). Under the *Blockburger* "same elements" test, two offenses are not the "same offense" if each requires proof of an element that the other does not. The *Smith* Court adopted *Blockburger* as the proper test under Michigan law relative to double jeopardy analysis in the context of multiple punishments[.] [*People v Chambers,* 277 Mich App 1, 2-3; __ NW2d __(2007) (Citations omitted).]

The Legislature did express a clear intent that multiple punishments be imposed. MCL 750.174a(6) uses the term "may" with respect to the decision to aggregate. The term "may" "is permissive and therefore indicative of discretion, *In re Forfeiture of Bail Bond,* 276 Mich App 482, 492; 740 NW2d 734 (2007). This grant of discretion plainly expresses the Legislature's intent to permit multiple punishments under the facts presented here. The prosecution may consider numerous acts committed in pursuit of a single scheme as a single offense, but it is not required to do so. Moreover, the prosecution must prove distinct facts for each count charged. Specifically, the amounts involved and the time frames at issue in each count are distinct and independent of each other. For this reason, we conclude the act of charging defendant with four counts of embezzlement is constitutionally permissible and consistent with *Smith, supra.*

Defendant also raises a "unit of prosecution" double jeopardy analysis as applied in cases such as *People v Wakeford,* 418 Mich 95; 341 NW2d 68 (1983), *People v Barber,* 255 Mich App 288; 659 NW2d 674 (2003); *People v Feldscher,* 146 Mich App 49, 52; 380 NW2d 50 (1985). The courts have "utilize[d] the so-called 'unit of prosecution' test as an aid in determining whether the Legislature intended to permit multiple convictions for the same conduct under a single statute." *People v Uphaus,* 275 Mich App 158, 174; 737 NW2d 519 (2007), rejected on other grounds by *People v Harper,* 479 Mich 599, 603 n 1; 739 NW2d 523 (2007).

In *Wakeford*, the Court determined "that the unit of prosecution for armed robbery is a person assaulted and robbed" and thus there was no double jeopardy violation for two counts of armed robbery where the defendant robbed two different cashiers during a single incident. *Supra at 112*. In *People v Dowdy*, 148 Mich App 517, 521; 384 NW2d 820 (1986), this Court determined that the unit of prosecution for first-degree criminal sexual conduct is the number of penetrations rather than the number of victims, and thus there was no double jeopardy violation for multiple penetrations of a single victim during a single episode. In *Feldscher*, the Court held that "there is one unit of prosecution arising from a single incident in which a defendant wilfully and maliciously damages property of another without regard to the number of individual items actually damaged" and thus a defendant who had damaged five cars belonging to the same owner during a single incident could be convicted of only one count of malicious destruction of personal property. *Id*. at 52. In *Barber*, the Court determined that the unit of prosecution for arson "is each separate house" and thus a defendant could be convicted of multiple counts of arson where he set fire to one house and the fire spread to other dwellings. *Barber, supra at* 295.

Assuming the "unit of prosecution" analysis is still relevant in light of *Smith, supra*, the above cases are of questionable relevance because each dealt with multiple offenses stemming from a single criminal episode. In this case, by contrast, defendant did not bilk Kemp out of her funds during a single episode. Rather, she engaged in a series of separate but related acts in which she obtained money from Kemp on different occasions. Each separate taking of money from a single victim as part of a single scheme can give rise to a separate charge of embezzlement. See *United States v Busacca*, 936 F2d 232, 239 (CA 6, 1991), cert den 502 US 985; 112 S Ct 595; 116 L Ed 2d 619 (1991).

IV Guidelines Scoring

A. Standard of Review

The court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). "A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). "Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence." *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

B. Analysis

Embezzlement from a vulnerable adult over $20,000 is a Class D offense against property subject to the statutory guidelines. MCL 777.16i. Under the guidelines as scored, defendant had 60 prior record variable points and 30 offense variable points, which placed defendant in the E-III category, for which the minimum sentence range is 19 to 38 months, MCL 777.65. As an

habitual offender fourth, the upper limit is doubled, MCL 777.21(3)(c), making the guidelines 19 to 76 months.[1] Defendant takes issue with the scoring of PRV 6, PRV 7, and OV 13.

1. PRV 6

PRV 6 considers defendant's relationship to the criminal justice system. MCL 777.56(1). Defendant was assessed 10 points, indicating that she was "on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony." MCL 777.56(1)(c). That score was apparently based on defendant's 1995 conviction of welfare fraud.

According to the presentence report, defendant was convicted of welfare fraud in the Ingham Circuit Court and sentenced to 60 months' probation in March 1995. She was discharged from probation "without improvement" on June 6, 2002. In her postjudgment motion, defendant argued that the Ingham Circuit Court lacked jurisdiction to extend her probation term beyond the five-year period and thus probation must be deemed to have ended in March 2000. Defendant's argument on appeal continues to be that PRV 6 was improperly scored because she was not legally on probation when the instant offenses were committed because the Ingham Circuit Court improperly extended her probation term. We agree that defendant's probation appears to have been improperly extended. Generally, a sentence of probation may not exceed 5 years. MCL 771.2; *People v Marks*, 340 Mich 495; 65 NW2d 698 (1954). Thus, it appears defendant's probationary period should have ended no later than March 15, 2000, five years after her sentence was imposed.

The prosecution does not argue the extended probationary period cannot be challenged in this litigation. Rather, the prosecution argues that since some of the wrongful conduct that formed the basis for Count I occurred prior to March 15, 2000, PRV 6 was properly scored at least with respect to Count I. We see no merit in the prosecution's argument because the statute under which defendant was charged became effective in September 2000. 2000 PA 222. Thus, defendant would not have been on probation when she committed any part of the instant offenses.

However, even assuming the trial court erred in scoring 10 points for PRV 6, defendant would not be entitled to resentencing. The trial court scored PRV 6 at 60 points. In order for there to be a change in the guideline range, the PRV point total must be below 50 points. Because we reject defendant's challenge to PRV 7, defendant's PRV scoring is, at best, reduced to 50 points, which will not change the guideline sentencing range.

[1] For reasons not apparent in the record, the trial court utilized the Sentence Information Report (SIR) created for use with the old judicial guidelines for fraud offenses and thus scored only OVs 8, 9, 17, and 25, as opposed to OVs 1-4, 9-10, 12-14, 16, and 19-20, those applicable under the legislative guidelines. MCL 777.22(2). In the middle of sentencing, the court recessed so the guidelines could be recalculated under the legislative guidelines. Apparently the parties determined that only OV 10, OV 13 (judicial OV 8), and OV 16 (judicial OV 17) were applicable and wrote the changes on the original SIR.

2. PRV 7

PRV 7 considers any subsequent or concurrent felony convictions. MCL 777.57(1). Defendant was assessed 20 points for having two or more subsequent or concurrent convictions. MCL 777.57(1)(a). Her challenge to this score is wholly dependent upon her argument in Issue II, *supra*. Since defendant could be convicted of multiple counts of embezzlement for offenses occurring in different years, this claim necessarily fails.

3. OV 13

OV 13 takes into consideration defendant's "continuing pattern of criminal behavior." MCL 777.43. OV 13 is the statutory counterpart to OV 8 of the judicial guidelines. Defendant was assessed 10 points for OV 8, meaning the offense was "part of a pattern of criminal activities over a period of time from which the offender derives a substantial portion of his or her income . . . ." Under OV 13, ten points could be scored only if the offense was "part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property."[2] MCL 777.43(1)(c).

As with PRV 7, defendant's challenge to OV 8/OV 13 is wholly dependent upon her argument in Issue II, *supra*. Since we conclude that defendant was properly convicted of multiple counts of embezzlement for offenses occurring in different years, this claim necessarily fails.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell

[2] There is another circumstance under which 10 points can be scored, MCL 777.43(1)(d), but it is not applicable here.